REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

HCCRA E009 OF 2024

JOHN MUNYAMBU KARIUKI.....APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(Being an appeal against the conviction and sentence by Hon. M. Sudi, PM, in Kandara Principal Magistrate's Court Criminal Case No. E077 of 2022 delivered on 1st August 2023)

JUDGMENT

1. The appellant, JOHN MUNYAMBU KARIUKI, was charged before the trial court with the offence of stealing contrary to section 268 as read with section 275 of the Penal Code. The particulars were that on 24th January 2021 at Gatunyu Town, in Gatanga Sub-County within Murang'a County, the accused stole a pressure pump, three pieces of tyre levers, and a tool box with spanners all valued at Kshs. 90,000/=, the property of John Kamau Mbugua.

Facts at trial

2. The accused person denied the charge and the matter

proceeded to full hearing. The prosecution called four witnesses.

3. PW1 was John Muiruri, a waiter. He testified that on 24th January 2021 at about 7.00 p.m. He was by the road at Gatundu when he met the appellant, who asked him and another person to assist in loading a water pump into the appellant's car, which they did. He stated that the pump owner later came and informed them that the appellant had taken it. In cross-examination, he affirmed that the appellant was well-known to her, and that the machine was placed in the boot of the motor vehicle. The appellant gave them Kshs. 100/= for cigarettes.
4. PW2, John Kamau Mbugua, was the complainant. He testified that the stolen items belonged to him. He stated that on 24th December 2022, he left Gatundu for Thika. That upon returning from Thika on 21st January 2021, he found that his pressure pump was missing and was informed by his son that the appellant, who was his customer, had taken it while stating that he was taking it to PW2's house. He testified that the pressure pump was heavy, that it required two or three people to carry it, and that the stolen items comprised the pressure pump and a tool box with spanners and tyre levers. He produced a receipt for the unicorn gas pipe, tool box, gas cylinder, unicorn gas pipe and a photograph of the machine. He further stated that nothing was recovered from the appellant.

5. PW3, Patrick Mburu, testified that on 24th December 2021 at about 7.00 p.m. he was with PW1 when the appellant came and asked for the complainant. He stated that the appellant then asked for the machine, whereupon he

and PW1 loaded it into the appellant's vehicle. According to him, the appellant said he was taking it to the complainant. Later, when the complainant came asking for the machine, it was not found at his home. He identified the appellant as the person who took it.

6. PW4, PC Albert Langat, was the investigating officer. He testified that following a report of theft made at Gatunyu Police Post, he was tasked on 24th December 2021 with the investigation. That the complainant alleged that the appellant had taken a pressure pump, tyre levers and a tool box valued at Kshs. 90,000/=. He stated that he visited the scene, recorded statements, summoned the appellant, arrested him, and later caused him to be charged. He produced the receipt and photograph that had been handed to him during investigations. On cross examination, he acknowledged that the charge sheet, initial report OB and receipts showed different figures, and that he had relied on the receipts provided which he deemed genuine.
7. At the close of the prosecution case, the trial court held that the prosecution had established a prima facie case against the accused and accordingly placed him on his defence.

Defence Case

8. The accused gave an unsworn statement and stated that he was the Principal Nursing Officer at Thika Level V Hospital. He stated

that he had two charge sheets, one dated December and the other dated January.

That the items purported to have been stolen could not fit in his car and produced a photograph of the vehicle as an exhibit. He further stated that the complainant had attempted to blackmail him into paying Kshs. 50,000/= in order for the case to be withdrawn. He also produced screenshots and an unsigned investigation diary. He maintained that he had not stolen the items and urged the court to dismiss the case.

9. The trial court, after considering the evidence, convicted the appellant and sentenced him to a fine of Kshs. 200,000/- or a term of one (1) year imprisonment in default.

10. Aggrieved by both conviction and sentence, the appellant lodged the present appeal vide a petition of appeal dated 26th February 2024, citing the following six grounds of appeal:

a. THAT the learned trial court erred in law and in fact by

convicting and sentencing the Appellant despite having insufficient evidence to do so as the burden of proof was not discharged on the applicable standard.

b. THAT the Trial Court failed to resolve material discrepancies and inconsistencies that were apparent in the prosecution case.

c. THAT the Trial Court rejected the Defence of the

intended Appellant without evaluating It.

d. **THAT the Trial Court erred in law and shifted the legal burden and evidential burden to the accused.**

e. **THAT the prosecution failed to adduce a key witness thereby the trial rendering wrongful judgment and conviction.**

f. **THAT the findings of the Trial Court were not based on evidence and/or were as a result of misapprehension of the evidence and based on wrong principles.**

11. The appeal was canvassed by way of written submissions. On record are submissions dated 15th July 2024, filed by the appellant; and submissions dated 13th January 2026, filed by the respondent; both of which this court has duly considered.

Appellant's Case

12. The appellant submitted that the evidence adduced was insufficient and that the prosecution had failed to discharge its burden of proof beyond reasonable doubt as required in criminal cases. He relied on the well-established principle in **Woolmington v DPP [1935] AC 462** that the burden of proof never shifts from the prosecution. The appellant argued that no stolen items were ever recovered from his possession, and that the complainant himself admitted he was not present when the alleged theft occurred, having left the items under the care of his son who was never called as a witness.

13. Further, there were several material discrepancies and inconsistencies within the prosecution case. He averred that PW2 (the complainant) stated the offence occurred on 24th December 2021, while the charge sheet indicated 24th January 2021, a discrepancy of approximately one month. Further, he submitted that PW1 described his car as a "Toyota Honda," an unknown make, and stated the car was black in colour, whereas his vehicle was a grey Honda. He argued that these discrepancies were not resolved by the trial court, contrary to the holding in **Twehangane v Uganda [1974] EA 350** that unresolved inconsistencies must benefit the accused.

14. It was the appellant's further submission that the prosecution failed to call crucial witnesses, particularly PW2's son, who had been left in charge of the stolen items, and whose absence was fatal to the prosecution's case. He relied on **Bukenya & Others v Uganda [1972] EA 549,** where the court held that the failure to call an available material witness without reasonable explanation leads to the inference that such witness's testimony would have been adverse to the prosecution.

15. The appellant argued that the trial court failed to properly evaluate his defence. He maintained that he had invited the court to inspect his car to demonstrate that the alleged machine could

not fit into its boot, an invitation the court did not act upon. He also contended that the prosecution had fronted a Kshs. 50,000/- settlement proposal, which he

interpreted as an attempt at blackmail, and that the unsigned investigation diary cast doubt on the integrity of the prosecution's case.

16. Further, that the trial court had erroneously placed the evidential burden of proof upon him. He cited **Okethi Okale & Others v Republic [1965] EA 555** for the proposition that an accused person is under no obligation to prove his innocence, and that a trial court's rejection of a defence does not automatically render the prosecution's case proved. The appellant further argued that the discrepancy between the offence date on the charge sheet and the dates given by witnesses rendered the charge sheet fatally defective. He submitted that this defect occasioned a failure of justice, as he was unable to properly defend himself against allegations with shifting timelines.

17. On the issue of misapprehension of evidence, the appellant contended that the trial court's findings were not grounded in the evidence. Specifically, he noted that PW3 had testified that the distance to the complainant's house was approximately a five minute walk away, raising questions about why the appellant would load a heavy machine into a small car boot for such a short distance when the machine was equipped with wheels. He further submitted that the photographs produced in court did not depict

him, and that he had no connection to them.

18. The appellant prayed that the appeal be allowed, conviction be quashed and sentence meted by the trial court to be set aside.

Respondent's Case

19. The respondent submitted that the prosecution had discharged its burden of proof beyond reasonable doubt and that ingredients of the offence of stealing under **Section 268 of the Penal Code** were fully satisfied. The respondent pointed to the direct eyewitness testimony of PW1 and PW3, who both saw the appellant take the machine with the pretence that he was delivering it to the owner. The respondent contended that the appellant's conduct of taking the machine without the owner's authority and never returning it, manifested a fraudulent intent to permanently deprive the owner of his property, as required by **Section 268(2)(a) of the Penal Code.**

20. On the alleged inconsistencies, the respondent submitted that the discrepancies cited by the appellant were minor, immaterial, and did not go to the root of the prosecution's case. Counsel argued that the variance between the charge sheet date of 24th January 2021 and the witnesses' reference to December 2021 was explained by the fact that the offence occurred in December 2021, and that the charge sheet contained a typographical error which did not prejudice the appellant. Relying on **Joseph Maina Mwangi v Republic [2000] eKLR,** the respondent submitted that not every discrepancy warrants an acquittal, and that only inconsistencies that are fundamental

and incurable vitiate a conviction. The respondent further argued that the witnesses' descriptions of the

appellant's vehicle, while slightly different, consistently identified the appellant as the perpetrator, and that minor discrepancies in non-material particulars were evidence of honest testimony rather than coached fabrication.

21. On the ground raised by the appellant that the prosecution failed to call key witnesses, the respondent submitted that the prosecution is not obliged to call a superfluity of witnesses. Counsel argued that the complainant's son was not present when the appellant took the machine and therefore could not have added anything material to the prosecution's case. The respondent relied on **Keter v Republic [2007] 1 EA 135** for the proposition that the prosecution need only call witnesses sufficient to prove its case to the required standard.

22. The respondent further submitted that the trial court properly considered and rejected the appellant's defence. Counsel argued that the appellant's claim that the machine could not fit into his car boot was contradicted by the eyewitnesses who actually loaded it. The respondent further submitted that the appellant's allegation of blackmail was unsubstantiated by any evidence, and that the court noted that parties had made an attempt at an out-of-court settlement could equally be interpreted as a genuine effort to resolve a criminal matter rather than blackmail/extortion.

23. Additionally, the respondent submitted that the trial court

never shifted the legal burden of proof to the appellant. Counsel argued that the

prosecution had established a *prima facie* case through direct evidence, and that the trial court's rejection of the appellant's unsworn defence was not tantamount to shifting the burden. The respondent distinguished **Okethi Okale v Republic** on the grounds that in the present case, the prosecution's evidence was strong and independent of any failure by the accused to rebut it.

24. As to whether the charge sheet was defective, the respondent conceded that there was a discrepancy regarding the date of the offence but submitted that the defect was not fatal. Counsel argued that **Section 214 of the Criminal Procedure Code** permits a court to amend a charge sheet at any time before judgment if no prejudice is caused to the accused. The respondent noted that the appellant fully understood the nature of the charge against him, cross-examined witnesses extensively, and mounted a defence. No miscarriage of justice, therefore, arose from the date discrepancy.

25. On the failure to recover stolen items, the respondent submitted that recovery of stolen property is not an essential element of the offence of stealing. Counsel relied on **Suleiman v Republic [1985] KLR** where the Court of Appeal held that the offence of stealing is complete upon the fraudulent taking and conversion of property, irrespective of whether the stolen items are subsequently recovered. The respondent argued that the absence of recovery went to the weight of evidence, not its admissibility or

sufficiency,

and that the trial court was entitled to convict on eyewitness testimony alone.

26. On the issue of sentence, the respondent submitted that the fine of Kshs. 200,000/- was within the trial court's discretion and the alternative imprisonment term of one year, was below the maximum penalty of three years' imprisonment prescribed by **Section 275 of the Penal Code**. Counsel urged the court to find that the sentence was neither manifestly excessive nor harsh in the circumstances and prayed that the appeal be dismissed, the conviction upheld, and the sentence affirmed.

Analysis and Determination

27. In determining this appeal, this court is fully aware of its duty as the first appellate court as espoused in the case of **Okeno Vs R (1972) EA 32** where the court stated:-

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion".***

28. Having carefully and cautiously considered the trial court's record, the grounds of appeal and the parties' rival submissions on

the appeal, I isolate the following issues for determination:

I. **Whether the prosecution proved the offence of stealing contrary to sections 268 and 275 of the Penal Code beyond reasonable doubt.**

ii. **Whether the inconsistencies in the prosecution case, the failure to call a material witness, and the treatment of the defence rendered the conviction unsafe.**

29. The offence of stealing is created by **section 268 of the Penal Code**. The prosecution was therefore required to prove that the appellant fraudulently and without claim of right took property capable of being stolen, or fraudulently converted it, and that the taking was attended by the requisite intent set out in section **268(2**), including an intent permanently to deprive the owner of the property. **Section 275** provides the general punishment for theft as follows:

> ***"Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years."***

30. The burden rested throughout upon the prosecution to establish those ingredients beyond reasonable doubt, and that burden never shifted to the appellant.

31. Upon re-evaluation of the evidence, it is clear that the prosecution placed reliance mainly on the testimony of PW1 and PW3, both of

whom stated they assisted the appellant to load the machine into his motor vehicle after

he stated that he was taking it to the complainant. That evidence, placed the appellant at the scene and showed that he took possession of the machine. It is also correct, as submitted by the respondent, that recovery of the stolen property is not an essential ingredient of the offence of stealing. A conviction may properly rest on credible eyewitness evidence even where no recovery has been made.

32. On the issue of charge sheet. The charge sheet stated that the offence was committed on 24th January 2021. PW1 similarly referred to 24th January 2021. PW3, however, testified that the events occurred on 24th December 2021. PW4, the investigating officer, also stated that he was assigned the matter on 24th December 2021. More significantly, PW2 stated that he left Gatundu on 24th December 2021 and returned on 21st January 2021. These were minor discrepancies relating to peripheral details. Given the direct evidence of PW1 and PW2.

33. In my view, such contradictions were not material. The date of the alleged offence was 24.1.2021. This came out clearly from the proceedings.

The appellant complaint that there were two charge sheets and that the dates in the prosecution case were inconsistent does not go to the root of the prosecutions case. No prejudice was caused to the accused

34. The Appellant complain that the son of the complainant was not called as a witness, to me the failure was not fatal. **Section 143 of the Evidence Act** provides that no particular number of witnesses is required to prove a fact, the prosecution is not obliged to call a superfluity of witnesses.

35. On the appellant’s defence, I have considered the unsworn statement in which he denied the offence, disputed that the items could fit in his vehicle, and alleged that the complainant had sought money for withdrawal of the case. The allegation of blackmail were not substantiated. Nevertheless, an accused person bears no burden to prove his innocence. His defence need only raise a reasonable doubt in the prosecution's case. In the present matter, I am satisfied that the trial court adequately weighed the defence against the prosecution's case.

36. On the issue , whether it was the Appellants car which carried the items or not, does not affect the prosecution's case given the direct evidence of PW1 and PW3. It is easy to mistake type/colour or make of a car.

37. In a nutshell, I find that , the prosecution proved its case against the Appellant beyond reasonable doubt and the trial court rightfully convicted the Appellant.

38. On the issue of Sentence , the Appellant was fined Ksh 200,000/= in default 1 year imprisonment.

39. It is settled that an appellate court will not interfere with the sentence unless the sentencing court acted on a wrong principle,

overlooked a material factor, or imposed a sentence that is manifestly excessive in the circumstances. I discern no such error here. The court exercised its discretion judiciously.

40. In the result, the appeal on both conviction and sentence is without merit. The conviction is hereby upheld, and the sentence affirmed.

41. Right of Appeal 14 days.

DATED, SIGNED AND DELIVERED ONLINE AT KAKAMEGA THIS 24th DAY OF APRIL, 2026.

S.N MBUNGI
JUDGE
In the Presence of:-
CA: Velma
Mr. Mwakio for the ODPP present online.
Appellant present online.